2

BRIEF EXAMINATION AND EXPOSITION

OF THE

Right of Detention, Visit, and Search

IN TIME OF PEACE.

EXAMINED ON LEGAL PRINCIPLES AND AUTHORITIES

BY

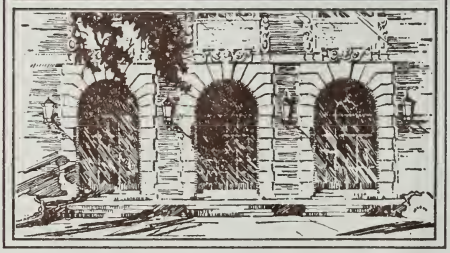
RICHARD S. COXE, LL. D.

COUNSELLOR AT LAW.

WASHINGTON:

HENRY POLKINHORN, PRINTER.

1858.



BRIEF EXAMINATION AND EXPOSITION

OF THE

Right of Detention, Visit, and Search

IN TIME OF PEACE.

EXAMINED ON LEGAL PRINCIPLES AND AUTHORITIES

BY

RICHARD S. COXE, LL. D.

COUNSELLOR AT LAW.

WASHINGTON:
HENRY POLKINHORN, PRINTER.
1858.

Note.—This article, on a subject of deep interest, was commenced with the simple design of presenting, perhaps through a single column in a newspaper, a view of the purely legal principles which affect one of the most interesting questions which now subsist between the United States and Great Britain. It has swelled, unexpectedly, into its present dimensions—large when compared with the original design, small when estimated by the magnitude and importance of the subject discussed. It is hoped that it has been treated with mildness of temper and courtesy of language, and that while in no manner disrespectful to Great Britain, it will confirm Americans in their belief that our country has, upon this interesting subject, advanced no claim or pretension not perfectly founded in and well sustained by the highest authority, and which we never can or will surrender. R. S. C.

ON

The Right of Detention, Visit, and Search.

The present aspect of affairs between the United States and Great Britain is calculated to awaken on both sides the most anxious solicitude, and certainly demands the most serious consideration. The exercise, by the cruisers of her Britannic Majesty, of a claim of right to detain on the oceans American vessels, while engaged in the prosecution of a lawful voyage, and sailing under the flag of their own country, in a time of profound peace, is conceded to be a flagrant outrage under any circumstances. To do this in the seas, so close to our own coast as the narrow passages between the several West India Islands and the territory of the United States, has at least the appearance of superadding indignity and insult to wrong.

It is not surprising, then, that the repeated recurrence of these insulting outrages should have kindled a deep feeling throughout the United States, or that some of our citizens should, under the strong sensibility to a supposed wrong, be disposed at once to retort upon the offenders with the alacrity and vigor which every hostile aggression, authorised or affirmed by a foreign power, would justly receive. Should Great Britain either have directed these proceedings, or assume the responsibility of them when brought to her notice by our Minister, such avowal can and will be considered in no other light than a public declaration of war. For years we have denied that any nation possesses the right

claimed and exercised by the cruisers of Great Britain; have refused to submit to even a modified exercise of it on the coast of Africa, as a means of repressing the slave-trade; and have given her distinctly to understand that any attempt to exercise it will be resisted by force of arms. When, therefore, under such circumstances, after such previous notification of the consequences which must result, any government directs or sanctions such proceedings, such conduct is tantamount to a declaration of war, and must be followed by general hostilities.

No formal declaration of war is required under the well recognised law of nations. Every hostile act, directed or sanctioned by one government against another, is an act of war, and places the two nations in a hostile attitude. We, therefore, await the response from England with anxiety, but with determination. On our side, a war, growing out of these proceedings, would be purely defensive. The aggressions have been wanton, deliberate, premeditated. They have been made with ample notice of what our national dignity, honor, and interests demand. They have been purely aggressive—not to repel any injury or insult, but to enforce against us a claim which we, denying its foundation in right, have avowed our determination to resist by arms.

It is important that the people of the United States should distinctly apprehend the true merits of a controversy which may lead to such results. It is equally unrighteous to enforce an unjust claim, and to resist or negative one which is well founded. If the claim which England asserts and undertakes to exercise be a lawful one, even a defensive war on our side, to prevent such exercise, would be unjust. If, on the other hand, her claim has no foundation in right, her aggressive acts, in support or execution of it, are as palpably wrong. If, then, it is clear that the justice of a war is, in no degree, dependent upon the question whether it be an offensive or a defensive one; if to assert and maintain a wrongful claim, by an act of hostility, be highly criminal, to repel such aggression cannot but be righteous. Independently of this

obvious truth, it may further be observed that, when one nation asserts a right which another denies, the ordinary courtesy which ought always to subsist between equals forbids the idea that either has been guilty of asserting what she knows to be untenable, but requires that each should be supposed honest and sincere in its respective opinion. To attempt by force, therefore, to compel acquiescence in a controverted claim, is discourteous and insulting. It carries with it, by distinct implication, the idea that the United States, in denying the right claimed by England, is not merely wrong in refusing to admit the exercise of this asserted right, but that such denial is not made *bona fide*, and is a sheer pretence, dishonorable as well as false in principle.

The distinct and positive assertion of the American doctrine, which recent events have elicited from so many quarters, demonstrates at least the honesty with which these views are entertained. Men of the highest and purest character—men of all parties, representing every variety of interest and all sections of our country—men most averse to any war in general, but more especially to one with Great Britain, are unanimous in their opinions and resolves. Their opinions are expressed in terms, and fortified by arguments, which, at least, indicate the sincerity with which they are entertained. Should an impartial world arrive at the conclusion that we have been wrong in these views, it is hardly to be conceived that any one would impute the error to any other origin than the fallibility of human judgment. This conclusion alone would sufficiently demonstrate the foul and insulting character of the wrong perpetrated by England, should she sanction or direct the continuance of the acts of which we complain. Should she be able to prove that we are wrong in the construction we have given to the law, until she also shows that we were knowingly, wilfully wrong, she will not have vindicated her conduct. The avowal of a determination to resist a claim believed to be unjust, honestly, publicly made, furnishes no pretext for a resort at once to force to establish the right of the party asserting it.

Other circumstances exist in this case. Before the present occasion, it is not known that England has ever at any one time attempted, by act or deed, to enforce this assumed right. Upon this subject it seems that an error has existed on all sides. It is alleged that this right of visit and search was one of the prominent causes which led to the war of 1812. This, it is apprehended, is a great mistake, and it is important that it should be corrected. Almost without intermission, from the time of the formation of our existing political institutions, until the year 1812, the two nations had never occupied the position they now hold, both being at peace. During the entire period, from the commencement of the wars originating in the French revolution, in 1793, until 1812, we were at peace and England at war, with the exception of the brief interval succeeding the treaty of Amiens. As a belligerent, the right of England to visit and search was never controverted by the United States. This right of visitation and search is one conceded by all the writers on the law of nations to a belligerent; and although for a time controverted by some of the northern powers on the continent of Europe, at least to the full extent claimed, or by them attempted to be modified and limited, it has never been denied by any jurist or statesman of this country.

Our difficulty with England stood on a wholly distinct ground. While we recognized the belligerent right of visitation and search of merchant vessels upon the high seas, we insisted that this being a right originating in and deriving its very existence from the law of nations, it was necessarily limited and restricted to objects over which that law had cognizance. That law, so far as relates to this subject, had reference to the relative rights and duties of belligerents and neutrals. It had nothing to do with the merely municipal laws or institutions of any particular nation. It authorised this visitation and search for the purpose of ascertaining whether the vessel or her cargo was neutral or hostile; whether there were on board contraband goods, or persons who were enemies. To this extent we always acknowledged

the right of a belligerent to examine, and the corresponding obligation of the neutral to submit to such an examination. Admitting this right, we consequently acquiesced in the legal conclusion involved in it, viz: that the right of visitation and search being a clear, undeniable, belligerent right, resistance to it was a wrong which would justify its enforcement by capture and condemnation as prize of the offending party.

These principles, not admitting of doubt or dispute on either side, have never been the subject of controversy. Our difficulty with England, anterior to the war of 1812, was of an entirely different character, involving questions to which distant allusion has been made in the foregoing remarks, but which are now to be more particularly noticed.

As has been said, the American government has uniformly recognized the right of visitation and search as a belligerent right, authorised and sanctioned by the law of nations, and, therefore, to find in that law the rules which justify its exercise, the subjects upon which it is to operate, the bounds to which it rightfully extends, and the restrictions by which it is to be limited. The British authorities, on the other hand, insisted that the right of visitation and search being, as all allowed, a belligerent right, entitled their cruisers to board a merchant vessel; and being once rightfully on board, their officers might continue the search, not only for the purpose of ascertaining whether the vessel or her cargo was neutral, and whether she had on board anything, or had done any act which injured the rights of the belligerent, but whether she had also on board any persons who, under the local or municipal law of England, owed allegiance to her, or were bound to military service under her. This claim obviously involved some most serious questions. The one was whether the belligerent right of visitation and search, being derived exclusively from the law of nations, was not limited to subjects and objects over which that law could operate. Second: Whether this right could legitimately be made the instrument, or afford the facilities for the enforcement of any purely municipal laws of the country of the belligerent. Third:

Whether, when the municipal laws of the belligerent which claimed the right, and those of the neutral upon whom it was to be exercised, were in antagonism, the former or the latter should prevail on board the neutral vessel. Upon these points the two governments differed. Independently of the argument on the part of the United States on the abstract question of right, the abuses and outrages, the insults and manifold personal injuries resulting from the actual exercise of the right claimed by England, were insisted upon and strongly urged. It was shown that, under color of this belligerent right of visit and search, the most gross outrages had been perpetrated, for which no or a very insufficient compensation had been made to the injured party. It was further insisted on that this right, to whatever extent it might be justified or allowed by the law of nations, conferred no authority to enforce the peculiar laws of the belligerent power, and therefore none, under any circumstances, to seize even an acknowledged subject of the British crown. That no individual could be arrested or taken on board an American vessel for a violation of English law, or to compel obedience to English institutions; and still further, that, as the United States, under her constitution and laws, allowed the subjects or citizens of any and every foreign government to become citizens of this country, and as such to be entitled to all the rights, privileges, and protection afforded to those who were native born, the rights of such were as perfect on board our own vessels as on our own territories. Thus we denied *in toto* the right of impressment on board an American ship.

Such were the matters in controversy between Great Britain and the United States preceding the war of 1812. If this is a correct representation of the case, it will appear that, during the whole of the discussions which preceded that war, there never occurred an occasion for England to advance the doctrine of the right of search or of visitation, or simply visit, as it has been recently designated by some English authorities, which will be hereafter alluded to, in time of peace.

Up to the year 1812, therefore, there never had been asserted by the British government or by any writer of any country, that such a right existed—certainly it was never carried into practice. From the termination of hostilities in Europe and America in 1814 and 1815, it has never been exercised by any power, unless specially provided for in some treaty. It cannot, therefore, be supposed that England means, at this late day, to claim the privilege of interpolating this new doctrine into the code of national law; but it is to be hoped and expected that she will disavow these offensive proceedings, and formally renounce the odious pretension upon which they rest.

It is certainly true, that Great Britain has formally promulgated her views on the subject, and that the government of the United States has, on the contrary, as distinctly denied their soundness. It is not the design of these remarks to dwell minutely on the diplomatic discussion of the subject. A very brief reference to this aspect of the case will be all that the occasion requires.

It is admitted by the representatives of both nations, that, in the negotiations even as late as 1841, this point was not discussed between Mr. Webster and Lord Ashburton; nor did the treaty concluded by those gentlemen, in any way distinctly touch it. It was, it is believed, first presented diplomatically in 1841, in a correspondence between our Minister, Mr. Stevenson, and the British government. In January, 1843, however, a despatch from Lord Aberdeen was communicated by Mr. Fox, the British Minister to this country, to the Department of State. That despatch was founded upon an interpretation which had been placed upon a brief paragraph in the last preceding annual message of the President, to the two Houses of Congress. While commenting upon the construction which this paragraph had received in England, his lordship takes occasion distinctly to avow, that his government claimed the right to visit merchant ships for certain purposes, in time of peace, and that this right it can never surrender.

Mr. Webster, in an elaborate despatch addressed to Mr. Everett in March, 1843, states, with great clearness, the British claim, the antagonistic doctrine maintained by this country, and discusses the matter at issue with his wonted ability.—(6 *Webster's Works*, pp. 329, &c.) The full reference which has been made to this document, and the ample quotations from it in the recent discussions in Congress, dispense with the necessity for further allusion to it on this occasion.

Even up to a very recent period the question may be regarded, so far as the two governments were concerned, as simply an abstract one. The one party had asserted a right, but had, as yet, never attempted to enforce it ; the other, while controverting the validity of the claim, had never been required to resort to any act of resistance. Till within the last few months, such has continued to be the position of the case. Unfortunately its aspect has been changed by officers in the British service, and it remains to be ascertained whether the offensive proceedings of these functionaries have been under governmental instructions, or will receive governmental approval.

The point at issue, as is obvious, is to be determined by the law of nations. That law settles the right one way or the other, and if its authority is repudiated, it must be settled by arms. It becomes us, therefore, to examine the question by this standard, and if, under that code, we are shown to be right, we can, with entire confidence in the justice of our cause, resolve at all hazards to maintain it.

It is not my intention to extend this examination to any great length, for the simple reason that the case does not require a protracted discussion. I shall content myself with citations from, and comments upon a few books, the authority of which has heretofore been held, by both parties, in the highest respect.

As no one writer of eminence, unless it may be one hereafter to be commented upon, no judicial decision, no one distinguished jurist has been cited as maintaining the Eng-

lish doctrine, we are absolved from the necessity of comparing and weighing the relative value and authority of different expositors of the same code. It will, however, appear that the subject has not escaped the notice of distinguished and accomplished jurists inboth countries; but with the single exception alluded to, and which will be more fully noticed in the sequel, all have concurred.

The first authority to which reference need be made, is the case of two Spanish vessels, before Sir William Scott, in 1803, (5 Rob. Adm., 36.) Condemnation of these vessels was sought on the ground of their having made resistance to the belligerent right of search, attempted by an English cruiser during the war which had recently broken out between Great Britain and France. The pendency of the war was, of course, uncontroverted, the belligerent right of search not denied, the actual resistance to its exercise unquestioned, the usual consequences of such resistance conceded. Notwithstanding all these grounds to justify condemnation, restitution was decreed. The learned judge held, that "it must be shown, in the first instance, that the vessel had reasonable ground to be satisfied of the existence of war, otherwise there is no such thing as neutral character, nor any foundation for the several duties which the law of nations imposes on that character. It is, therefore, a very material circumstance in this case, that at the time of sailing, no war was supposed to exist, in the knowledge of those who commanded these vessels. They sailed in perfect ignorance of war, and, consequently, unconscious that they had any neutral duties to perform." "The whole of this proceeding is, surely, as different as possible from a case of criminal resistance to a lawful cruiser; since there is no reason to suppose that the vessels knew, either that the assailants were commissioned cruisers, or that they themselves had any neutral duties to discharge." "If the acts of resistance had been much stronger than they appear to have been in the conduct of these parties, they would have been acts of innocent misapprehension only."

If, then, the resistance to an act of search by a belligerent

cruiser involved no criminality, and consequently did not subject the vessels to condemnation, because of ignorance that war existed, and therefore, that belligerent rights and neutral duties existed, although actual war existed, and the assailant was a commissioned cruiser of a belligerent nation, *a fortiori*, would it follow that, when in fact no war exists, and there could be no belligerent right of search or neutral obligation to submit to it, such resistance would be perfectly justifiable and absolutely rightful.

It ought further to be observed that this case, if recognized as authority, as clearly annihilates the recent English pretension, that there is a distinction between the right of visitation and search, and a right of visit. It appears from the judgment pronounced by Sir William Scott, that "when the British boats approached the Spanish vessels, on being asked what they wanted, they answered to come on board; to which it was replied from the Spanish vessels, that if they had anything to say, they might speak; *certainly it was not necessary for the purpose of information that they should have gone on board.*" "Nothing more passed than that the request to come on board was refused."

English lawyers and English courts, if not British statesmen, bow with reverence to the opinions of Sir William Scott, upon questions originating in the law of nations; and if the same paramount authority is not yielded implicitly to his judgment, in other countries, it is because it is believed, and upon substantial grounds, that even he yielded too much to the political and temporary views of his own government, in his administration of public law.

When this eminent judge pronounced this judgment, he entertained opinions upon the subject of the duties of those tribunals which administered the law of nations, which are so eloquently and beautifully expressed in the famous case of the Swedish Convoy, (The Maria, 1 Rob. 350,) and which on every account deserves to be quoted and remembered. "In forming my judgment," he observes, "I trust that it has not escaped my anxious recollection for one moment, what

it is that the duty of my station calls for from me: namely, to consider myself here, not to deliver occasional and shifting opinions, to serve present purposes of particular national interests, but to administer, with indifference, that justice which the law of nations holds out, without distinction, to independent States, some happening to be neutral and some belligerent. The seat of judicial authority is indeed locally here in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine the question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals."

In another case, (the *Flad Oyen*, 1 Rob. 142,) Sir Wm. Scott expresses similar views. Mentioning a pretension of the French government, as an attempt made for the first time in the world, in the year 1799, he adds, "In my opinion, if it could be shown that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient, that would not be enough, more must be proved; it must be shown that it is conformable to the usage and practice of nations." "A great part of the law of nations stands on no other foundation. It is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent, and if it stops there you are not at liberty to go further, and to say that more general speculation will bear you out in a further progress."

The manner and language in which these great doctrines were enunciated had not only a great influence in elevating the reputation of the individual judge from whose lips they flowed, but also to inspire among other nations an entire

confidence in the ability, integrity, and impartiality with which the law was administered in the prize courts of Great Britain. The doctrines themselves were not new—similar language had been employed by distinguished English jurists in the celebrated answer of Great Britain to the Prussian memorial, more than half a century earlier. That document was, however, a legal argument on behalf of a party in interest. On this last occasion it was an official judicial exposition of the law; the well considered, deliberate judgment of the ablest judge who had ever presided in one of the most august tribunals the world has ever seen.

One other citation we shall venture to make from the same distinguished authority, on an occasion when this great man had practically, at least to some extent, abandoned, or at least swerved from his first and most highly approved opinions. In the case of the *Fox*, in 1811, he thus expressed himself: "It is strictly true, that by the constitution of this country, the king in council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this court. These two propositions, that the court is bound to administer the laws of nations, and that it is bound to enforce the king's orders in council, are not at all inconsistent with each other, because those orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law." "The constitution of this country relatively to the legislative power of the king in council, is analogous to that of the courts of common law, relatively to that of the parliament of this kingdom." Yet, in the very same opinion, he thus avows his adherence to his former docrines: "This court," he says, "is bound to administer the law of nations to the subjects of other countries, in the different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law, evidenced in the course of

its decisions, and collected from the common usage of civilized States."

It would be painful to give utterance to all the comments which such an obvious antagonism of views might warrant. To some extent, they have been criticized in able comments by English authorities, some of which will be found in the 19th vol. Edinb. Review, p. 309, &c.

On the present occasion, we shall confine ourselves to a few brief comments.

1. The presumption that the orders in council have been and will be in precise conformity with the unwritten laws of nations, is, it seems to our minds, a palpable absurdity. If they should neither go beyond nor fall short of the unwritten law of nations, "collected from the common usage of civilized States," then they are manifestly altogether supererogatory. They clearly cannot indicate what is or what can be collected from that common usage. If they add anything to it or detract anything from it, they do not conform to it as expounders of the general law, the foundations of which rest, not only as to its general principles, but as to their application to particular cases, and their modification under particular circumstances, on "the common usage of civilized nations," to employ the language of Sir Wm. Scott himself, in the opinion last cited, the monarch of England has no right to attribute to himself the character of a legal expositor—whose expositions are to be recognized in courts administering these laws.

2. If the British government may claim this prerogative, upon every principle of the laws of nations, the same right of interpretation must belong to every other government. It is unnecessary here to dilate upon the consequences which must flow from the practical adoption of this theory. Each nation, being its own interpreter of that law, by which all are in theory equally bound, it is manifest, that it will constantly vary with times, occasions, and countries. It can no longer be said of it, *non est alia Romæ alia athenis.* In fact, it will cease to be law in any sense or to any purpose.

3. The doctrine thus enounced is in flat contradiction of the doctrine laid down by the same eminent judge in the case of the *Flad Oyer*, already quoted. There he insisted that the attempt by the French government in 1799 to introduce a new doctrine into public law, on mere general speculative principles, was irregular, that "more must be proved; it must be shown that it is conformable to the usage and practice of nations." No attempt has ever been made to justify the British orders in council on this ground.

4. The analogy, by which Sir Wm. Scott attempts to justify his departure from his former opinions, is by no means the least objectionable part of this opinion. He asserts that the admiralty court owes the same obedience to the orders of the king in council as the civil courts do to the acts of Parliament, each exercising and possessing complete legislative power; and that the presumption is that all these orders and instructions are and will be in accordance with the unwritten law, the usages of civilized nations. These are novel and monstrous doctrines; to an American mind they appear equally absurd and contradic-tory. No lawyer in England ever advanced the idea that Parliament only possessed the faculty and authority of an interpreter and expounder of the common or unwritten law of the land. It unquestionably does, under the institutions of that country, possess, and occasionally, but unfrequently, exercise this limited power of interpreting and expounding the common law. Such declaratory statutes, as they are familiarly and technically called, are very unusual, and even in relation to them, they are held, by all English jurists and courts, to be purely and exclusively prospective in their operation They have never assumed the power, at least in modern times, of determining how the common law ought now or should have been formerly understood; they only declare how it shall thereafter be interpreted. The British Parliament possesses and constantly exercises its unquestioned power of changing the common law at its pleasure, to meet the varying exigencies of the times, to carry out its own

views of expediency or policy, and its acts supersede and annul all that is in the common law at variance with the statute. No presumption ever exists, much less to the extent of determining the validity of an act of Parliament, that its provisions are in accordance with and only designed to interpret the common law. The avowed object is to change that law. Indeed, some writers on English jurisprudence have contended that the common law itself originated in and derives its authority from acts of Parliament, now lost or obsolete.

If such analogy as Sir Wm. Scott suggests has any substantial existenee, and if the argument he deduces from it possesses any weight, it must conduct to conclusions which that eminent man had too much sagacity not to see, but which he had not the temerity to enounce. It asserts, substantially, that the British crown possesses the supreme and absolute authority to interpolate, at any time, and under any circumstances, such new doctrines and principles as may suit its present views and policy into the law of nations, under color of interpreting, expounding, or applying it. Indeed, Sir Wm. seems, in two memorable instances, to have sanctioned this practical result. In reference to the doctrine of blockade, as well as on the subject of the orders in council, his later decisions, utterly at variance with those he had formerly pronounced, can only be justified on the ground of this monstrous heresy. A power to give an authoritative interpretation of a law, and especially to direct its application to particular cases, not previously comprehended in its terms or recognized by general usage, necessarily assumes, either the legislative authority to enact or the judicial power to determine questions arising under it, or as in the instances cited exercises both functions.

It is apprehended that the complete vindication of the American doctrine, upon the subject now under discussion, might safely be rested upon the grounds already presented. No one authority has been exhibited in contradiction of it; no one adjudication affirming the views of the British govern-

ment; no one indication of the usage of nations in conformity with it, although the challenge has been repeatedly given to produce one. Until the last few months, no one actual exercise of the right as claimed even by England herself has been intimated; and, finally, it has been shown that her pretension is deficient in every characteristic which ought to distinguish a principle of national and universal law. On the general doctrines expressed by her own highest authorities, diplomatic, and in her legislature, or special adjudication made by her highest tribunals, the claim now advanced is wholly unwarranted.

It may be urged that this is still but negative proof, and to some extent this is conceded. What stronger proof, however, need be exhibited in resisting a claim than that which is negative? One party asserts a right; it is denied by the other. The former holds the affirmative and is bound to support his pretension. He who denies may rest upon the simple denial, without more, until such proof is exhibited. We assert that England has shown no evidence of any consent or any usage of nations in general, sustaining her claim. This assertion remains uncontradicted. If erroneous, the error has not yet been exposed; the gauntlet thrown down has not been taken up.

In these observations we have advanced further in the discussion. It has been shown, at least till our assertion is denied, and proved to be incorrect, that no such doctrine as that now advanced on behalf of the English proceedings, has any foundation in the law of nations, and that it is altogether of recent origin, even with herself, that the principle has never been maintained by any writer of authority, either in her own or in any other country.

We now go further. The next case to which reference need be made, among the decisions of Sir Wm. Scott, is that of *Le Louis*, reported 2 Dodson, 210. This is, in its connection with the present subject, the most important case to be found in the judicial annals of England. It occurred in the year 1817. It was elaborately argued by the most distin-

guished advocates at the bar of the Court of Admiralty, and it elicited, on the part of the counsel as well as the bench, proofs of the most laborious research, as well as the highest powers of reasoning.

The Le Louis was a French vessel, captured by an English cruiser in January, 1816, near the coast of Africa, and was supposed to be a slaver. It was a period of peace. An attempt had been made to visit and search her. She resisted, and a conflict ensued, which resulted in the loss of several lives on each side. A decree of condemnation on several distinct grounds had passed in the Vice Admiralty Court of Sierra Leone, and that judgment was brought before Sir Wm. Scott for review. One of the principal points in the case, and one of prominent importance, involved the questions of the right of a British cruiser to visit and search foreign vessels on the high seas, in time of peace, on the ground of her being employed in the slave-trade, and the right of the ship thus visited to resist the attempt by force. Dr. Lushington, (p. 216,) and Dr. Dodson, (p. 226, &c.,) denied, in the most peremptory manner, the existence of the right of visit and search in time of peace, and challenged their learned opponents to cite one judicial decision, or one authoritative dictum, to sustain such a claim. No such authority was produced. In the judgment, Sir Wm. Scott employs this language: "Assuming the fact, which is indistinctly proved, that there was a demand and a resistance, producing the deplorable results here described, I think that the natural order of things compels me to inquire, first, whether the party who demanded had a right to search; for, if not, not only was the resistance to it lawful, but likewise the very fact on which the other ground of condemnation rests is totally removed. For if no right to visit and search, then no ulterior right of seizing and bringing in and proceeding to adjudication, &c." Upon the first question, whether the right to search exists in time of peace, I have to observe two principles of public law are generally recognized as fundamental. One is the perfect equality and entire indepen-

dence of all distinct States. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another. *I can find no authority that gives the right of interruption to the navigation of States in amity upon the high seas, excepting that which the rights of war gives to both belligerents against neutrals.* This right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce"—pp. 240–41. "At present, under the law as now generally understood and practiced, no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim. If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt: that it has not the same foundation on which alone it is tolerated in war—the necessities of self-defence. They introduced it in war, and practice has established it. No such necessities have introduced it in peace, and no such practice has established it"—p. 245. In page 225, Sir Wm Scott adverts to a very interesting fact, having an important bearing upon the question under consideration; he says, "The project of the treaty proposed by Great Britain to France, in 1815, is,

'that *permission* should be reciprocally given by each nation to search and bring in the ships of each other;' and when the permission of neutrals to have their ships searched is asked at the commencement of a war, it may then be time enough to admit that the right stands on exactly the same footing in time of war and in time of peace."* Again, p. 257, "If I felt it necessary to press the consideration further, it would be by stating the gigantic mischiefs which such a claim is likely to produce. It is no secret, particularly in this place, that the right of search, in time of war, though unquestionable, is not submitted to without complaints loud and bitter, in spite of all the modifications that can be applied to it." "If it be assumed by force, and left at large to operate reciprocally upon the ships of every State, (for it must be a right of all against all,) without any other limits as to time, place, or mode of inquiry, than such as the prudence

* In Mr. Walsh's appeal, p. 375, published in 1819, there is a passage illustrating this point in Sir Wm. Scott's argument. "In the first negotiations respecting the (slave) trade, which Lord Castlereagh opened with the French cabinet after the treaty of 1814, he suggested, as a desirable arrangement, the *concession of a mutual right of search and capture in certain latitudes*, between France and Great Britain, in order to prevent an illegal exportation from the coast of Africa. The Duke of Wellington made the proposition to the Prince of Benevento, but soon discovered that it was too disagreeable to the French government and nation to admit a hope of its being urged with success. I do not find from the history of the Conferences at Vienna, in 1815, that it was more than hinted in these conferences. Spain and Portugal, however, in their mock renunciation of the trade north of the equinoctial line, acceded to a stipulation of like tenor. Great satisfation was expressed in Parliament with the arrangement, when the Spanish treaty came under discussion. *The introduction of the right of search* and bringing in for condemnation, *in time of peace*, was declared to be a *precedent* of the utmost importance." On the same authorty it appears that, in June, 1818, Lord Castlereagh addressed a special letter to the American Minister, enclosing copies of the treaties made with Spain and Portugal, and inviting the government of the United States to enter into the plan digested in those treaties for the suppression of the slave-trade, which must otherwise prove irreducible. The answer of the American government, communicated at the end of December, by the American Ambassador, is detailed in the report of the institution. He asserts the deep and unfeigned solicitude of the United States for the universal extirpation of the slave-trade, but with all due comity declines the proposed arrangements as being of a character "not adapted to the circumstances or institutions of the United States." Mr. W. pointedly remarks, "Truly the United States had sufficiently proved the British right of search in time of war to be careful not to create one for the season of peace." "In July, 1816, a circular intimation was given to all British cruisers that the right of search, being a belligerent right, had ceased with the war."—*Wheaton's Right of Search*, 25. See also American State Papers, Foreign Relations, vol. 4, p. 400, and *Wheaton*, from p. 25.

of particular States, or the individual subjects may impose, I leave the tragedy contained in this case to illustrate the effects that are likely to arise in the very first stages of the process, without adding to the account, what must be considered a most awful part of it, the perpetual irritation and the universal hostility which are likely to ensue."

It has, it is believed, been fully shown in the preceding pages, that the claim of England, under the law of nations, to exercise any right, be it called visit, visitation, or search, in time of peace, is not only of modern, but very recent origin; that it has never been asserted by any other nation; that it is entirely destitute of those grounds on which the entire law of nations and each of its distinct principles can alone find any assured foundation, viz: a general recognition by the civilized nations of the world. It would not be easy to add to the force of the argument of Sir Wm. Scott in rebutting every ground upon which Britain has claimed this right, or to sustain every principle by which that pretence has been controverted by the United States.

It now remains to examine the views presented on this subject by Mr. Phillemore, the most recent distinguished author in England upon the laws of nations. It is but justice to this gentleman to say that his valuable work is characterised by diligent research, extensive and profound erudition, and, in the main, by fairness and impartiality. On this particular branch of his subject, it will devolve upon us to point out what we cannot but apprehend to be an aberration from that clearness and fairness which in general we acknowledge to belong to him.

The third chapter of his third volume is appropriated to the discussion of the right of *visit* and *search*. He commences by citing two passages from French writers, to show that, even in time of peace, it is not lawful for a vessel to sail upon the high seas without any papers on board indicating the nation to which she belongs," &c. From this general principle he proceeds *per saltem* to assert "that a vessel may, under extraordinary circumstances of grave suspicion,

be visited in time of peace on the high seas; for how otherwise could it be ascertained whether or not she carried the proper papers on board? Or for what purpose, if she may not be visited, is she to carry them? These circumstances of "grave suspicion" are to be found in some "extraordinary case," and to attach to some particular "vessel." Without further specification the doctrince advanced is certainly vague and obscure.

The proposition, at least the ground on which it is supposed to rest, is clothed rather in the form of an interrogation than in that of direct assertion. It may, without meriting the opprobrium of merely punning, be said that it comes in a very questionable shape. It may be answered in the same form. Is there any law of nations which prescribes the form and character of the papers which a vessel ought to carry in time of peace? Are not these directed in every nation by its own peculiar laws? Each nation has a right to prescribe to its own vessels what papers they shall carry to exhibit their national character, and require them to conform to its own municipal regulations. Sometimes, by conventions between different powers, papers of another kind are required under peculiar circumstances, or to provide against particular incidents. But it cannot be pretended that any particular description of papers is required by the law of nations; that a neutral cruiser has a right to detain, for the purpose of ascertaining whether a ship is furnished with such documents, or that the want of such papers would justify a foreign vessel in the seizure of such vessel, or subject her to condemnation. The right of search must exist before such an inquiry can be lawfully made. The want of proper papers may prevent an original clearance from a native port, may interfere with entry into a foreign port of destination, may warrant the cruisers of any nation or its revenue officers within their appropriate sphere of jurisdiction, in visiting vessels which, within such jurisdiction, bear their respective national flag, or come within the boundaries of their respective ports or harbors, to enforce the revenue or other muni-

cipal laws of their own countries. Surely Mr. Phillemore will scarcely contend that an American or Spanish cruiser has a right, either on the broad ocean or in the English channel, to visit a vessel sailing under the British flag to see whether she is provided with such papers as the law of its own country requires.

His second proposition being a mere inference from the preceding, is, it is conceived, already answered in what has been said.

The next doctrine advanced by Mr. Phillemore demands a more distinct and serious reply. "It is quite true," says he, "that the right of visit and search is strictly a belligerent right." He, however, continues: "But the right of visit in time of peace, for the purpose of ascertaining the nationality of a vessel, is a part, indeed, but a very small part, of the belligerent right of visit and search."

For the first clause in this paragraph the author cites the case of *Le Louis*, from 2 Dodson; *La Jeune Eugenie*, 2 Mason, 409, as cited in the *Antelope*, 10 Wheat, 66. No authority is referred to to sustain the second and most important clause. It is made to rest on the simple authority of Mr. Phillemore himself. The language employed is not characterised by the clearness and distinctness usually displayed by the learned author. He limits the right which he asserts to one single object, "the purpose of ascertaining the nationality of a vessel." He does not, however, intimate in whom the right exists to determine or to inquire into this nationality, under what circumstances or to what extent such right may be exercised, what is to result from the fact when ascertained, or what penalties may attach to the vessel resisting such an attempt to visit. Nor does he point out by what evidence this nationality is to be established. What is even more remarkable, he omits to explain the extraordinary proposition, that a right which he claims may be exercised in time of peace, can possibly be a part, however small, of a belligerent right. Without any explanation we must say, with all due respect to the learned commentator, the proposition is to our minds unintelligible, contradictory, and preposterous.

Had Mr. Phillemore diligently examined the cases to which he refers as sustaining the first clause of the paragraph, he could not have failed to perceive, that they as distinctly contradict and repudiate his last position as they affirm the first. The citations already made from *Le Louis* are in direct opposition to the view of the commentator. In the case of *La Jeune Eugenie*, Mr. Justice Story (2 Mason, 436) thus expresses himself: "I am free to admit, as a general proposition, that the right of visitation and search of foreign ships on the high seas, can be exercised only in time of war, in virtue of a belligerent claim, and that *there is no admitted principle or practice which justifies its exercise in time of peace.*" The *Antelope*, in 10 Wheaton, was a case of a foreign vessel. Chief Justice Marshal, in delivering the opinion of the court, overrules so much of the judgment in *La Jeune Eugenie* as had sustained the doctrine that the slave-trade was prohibited by the law of nations. In another part of his judgment, he says:

"If it (the slave-trade) is consistent with the law of nations, it cannot, in itself, be piracy. It can be made so only by statutes; and the obligation of the statute cannot transcend the legislative power of the State which may enact it. If it be neither repugnant to the law of nations, nor piracy, it is almost supurfluous to say, in this court, that the right of bringing in for adjudication, in time of peace, even where the vessel belongs to a nation which prohibited the trade, cannot exist. The courts of no country execute the penal laws of another; and the course of the American government on the subject of visitation and search would decide any case in which that right had been exercised by an American cruiser, on the vessel of a foreign nation not violating our municipal laws, against the captors," (pp. 122, 123.)

So much for the very cases referred to by Mr. Phillemore in this very paragraph. They effectively annihilate his proposition.

The learned author then quotes a passage from Bynkershock, which he himself admits was part of an argument for

the right of search in time of war, and then observes, "surely this reasoning applies to the right of ascertaining the national character of a *suspected pirate*, in time of peace; and it may be added, that it appears to have been so considered by no less a person than Mr. Chancellor Kent."

So far as regards this logic, if so it may be called, it has been abundantly refuted by Sir William Scott in the *Louis*, where he refused to attach the smallest importance to "a solemn declaration of very eminent persons assembled in Congress, whose rank, high as it is, is by no means the most respectable foundation for the weight of their opinion."

The invocation of Chancellor Kent, as sustaining, to any extent, the position contended for, must not, however, be allowed to escape with so slight a notice. In the third edition of his commentaries, page 153, this able jurist thus declares his view of the law. It is given in his precise words:

"In order to enforce the rights of *belligerent* nations against the delinquencies of *neutrals*, and to ascertain the real, as well as assumed, character of all vessels on the high seas, the law of nations arms them with the practical power of visitation and search. The duty of self-preservation gives to belligerent nations this right. It is founded upon necessity, and is *strictly and exclusively a war right, and does not exist in time of peace.* All writers upon the law of nations, and the highest authorities, acknowledge the right as resting on sound principles of public jurisprudence, and upon the institutes and practice of all great maritime powers." The authorities referred to in support of this doctrine are Vattel—the *Maria*, 1 Rob., 287; 2 Dodson, 245, (*Le Louis*, a passage we have already cited, in which the exercise of such right in time of peace is distinctly repudiated;) the *Marianna Flora*, 11 Wheat., 42, a case presently to be cited.

By what process of reasoning such language can be made to sustain a proposition which it distinctly repudiates, and which is equally at variance with each of the authorities quoted by the Chancellor; by what Procrustean method, doctrines, so distinctly opposed, can be brought to sustain a

proposition which they appear to condemn and disavow, Mr. Phillemore has not thought it expedient to explain. From the terms of high eulogium he applies to this distinguished American jurist, it might be inferred that he was familiar with his writings, or at all events, with his great production—his commentaries—to which he so frequently refers. If what has already been said furnishes some indications, to say the least, of unfairness and misrepresentation, what shall be said of the accumulated evidence now to be produced? In page 25 of the same volume which Mr. Phillemore professes to quote, the learned Chancellor says:

"The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind, and the public jurists, generally and explicitly, deny that the main ocean can ever be appropriated. The subjects of all nations meet there *in time of peace*, on a footing of entire equality and independence. No nation has any right of jurisdiction at sea, except it be over the persons of its own subjects, in its own vessels; and so far territorial jurisdiction may be considered as preserved; for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs. This jurisdiction is confined to the ship; and no one ship has a right to prohibit the approach of another at sea, or to draw round her a line of territorial jurisdiction, within which no other is at liberty to intrude. Every vessel, in time of peace, has a right to consult its own safety and convenience, and to pursue its own course and business, without being disturbed, when it does not violate the rights of others."

Enough has been said, it is believed, to show how much confidence is justly to be attributed to the candor and impartial judgment of Mr. Phillemore; but we cannot resist the opportunity of adverting to another specimen of the same character. Appended to the citation above adverted to from Bynkershock, which, while used as an argument in favor of

the belligerent right of visitation and search, he intimates is equally applicable to the existence of the same right in time of peace, which is that a ship is bound to have on board papers which will demonstrate her national character, he again cites American authorities. He refers to 1 Paine, 594; 1 Kent Com., 161, 158.

Now, the case cited from Paine is that of *Catlett vs. Pacific Insurance Company.* The action was brought upon a policy of insurance, to which citizens of the United States were alone parties, to which there actually existed, or was implied, a warranty that the vessel was American. The question was whether the party had shown a compliance with this condition. The court expressed its opinion that a register was sufficient evidence of this fact. "There being a state of universal peace, and no treaty provisions applicable to the voyage, the register was all that could be necessary to show the national character. No question of belligerent or neutral rights could arise." Two cases were cited in the argument of the case, (14 Johns, 316; 2 Serg. and R., 133.) It may be sufficient to say that all these cases involved questions of purely municipal law, what were the documents required by the American law under our own revenue system. These questions arose in American courts, and were to be adjudicated by the law of the land. Not a word is said as to the evidence which the law of nations may require to establish the nationality of a vessel, and this was the point, and the only point, which it was pertinent to Mr. Phillemore's argument to shew.

In a previous passage from his work, which meets with, as it deserves, our almost entire concurrence and approbation, he thus expresses himself, in his chapter on the general character and duty of tribunals of prize. Such a court, he says, p. 533, "ought to command the respect of nations; it ought to be above—not slander, indeed, for then it would not be a human institution—but just and reasonable suspicion. It ought to administer international not municipal law, except in so far as it might happen that the latter was identical with or

declaratory of the former. Its procedure ought to be open and exposed to all criticism. It ought to allow every liberty of speech to the claimant or his representative, as well as to the belligerent or his representative. It should administer a consistent law, upon certain and known principles, impartially applied to all States and to their subjects. The high standard of the great philosopher and jurist of antiquity, (*neque erit alia lex Romæ, alia Athenis; alia nunc, alia posthac,*) should be perpetually before its eyes. It should always remember that the law which it has to administer is not of one character at Rome and another at Athens, but one and the same everywhere, followed and applied, as far as human infirmity will permit, upon the principles of immutable right and eternal justice."

So long as the English admiralty courts acted upon these principles and rigidly practised, them, so long as British jurists acknowledged and maintained them, those tribunals and judges were the admiration of the world—all recognized the ability, the integrity with which their judgments were pronounced, and their opinions were universally revered.

It is hoped that another opportunity will be soon afforded them of sustaining this high reputation. If every American vessel which has been stopped in her voyage shall institute proceedings in the British courts, claiming damages for the stoppage and detention of them on their voyage, and claim demurrage, and if, particularly, those that have been fired into or stopped by force, should institute similar proceedings, it would be ascertained how far British courts, assuming to administer the laws of nations, would maintain their former character.

We have thus inadvertently been brought off, for a moment, from the immediate subject before us; to that we shall now return, to meet the only remaining point which it appears necessary to discuss. The English government, and its advocates, endeavor to support their views upon this subject by a new sophism; they try, at least by assertion, neither by argument, reason, nor authority, to draw a line

of distinction between the right of visit and that of visitation and search. They have repeatededly been challenged to produce any individual authority which mentions, much less asserts, this distinction. To this challenge no response has been yet made by either jurist or diplomat. On the American side it is denied that there is any foundation for such distinction beyond the mere grammatical one between a verb and a substantive. We understand the verb visit to signify to make a visitation; we understand visitation as the act of visiting. Such is the acceptation of these words, as is believed without exception, by every writer and lexicographer. Lord Aberdeen, who it is believed was the first author of this distinction, can hardly, even in Great Britain, be regarded as of higher authority than Lord Castlereagh, Mr. Canning, and other accomplished English statesmen; or than Sir Wm. Scott, Dr. Lushington, Dr. Dodson, to whom it was apparently unknown. He belongs to the Scotch school, admirably accomplished in all the refinements of metaphysics, but to whom neither Americans nor English would ordinarily be disposed to resort as umpires in a question as to the precise signification of English words.

The distinction, which we consider as a mere specimen of what an eminent Scotch writer has called logomachy, has never received the sanction of any British judge, or of any British jurist, anterior to the time of Mr. Phillemore. It is utterly unknown on the continent of Europe. In the most approved French dictionaries we find that the word *visiter* is translated into English by the phrase *to search*, *visiter les merchandises*, to search commodities; *visiter unnavine*, to search a ship. As Mr. Webster and Mr. Wheaton have remarked, no writer on the continent has ever afforded the least sanction to this modern distinction.

In the absence of all authority to the contrary, we may be permitted to quote, as, at all events in our judgment, conclusive upon the subject, the solemn exposition of the law by the Supreme Court of our own country, in the case of the *Marianna Flora*, reported in 11 Wheaton. This case is

specially adverted to, and a long citation from the judgment of the Supreme Court is given by Mr. Phillemore, p. 422. But the quotation made by him would fail to convey anything approaching to a correct exposition of the views expressed by the august tribunal by whom the case was decided, and is likely to mislead readers who rely upon Mr. Phillemore as an expositor of the law.

Correctly to understand and properly to appreciate the language of the court, especially when pronounced at some length in the exposition of the law in a case *primæ impressionis*, the facts and circumstances of the case should be fully and fairly presented. This Mr. Phillemore has failed or omitted to do. Be it our part to supply his deficiency. So far as the present question is in any way affected by this case, the facts were, as stated by the reporter.

On the morning of the 5th November, 1821, the Alligator and the Marianna Flora were mutually descried by each other on the ocean, at the distance of about nine miles; the Alligator, being on a cruise against pirates and slave-traders, under the instructions of the President, and the Portuguese vessel being on a voyage from Bahia to Lisbon, with a valuable cargo. The two vessels were then steering on courses nearly at right angles with each other; the Marianna Flora, being under the lee bow of the Alligator. A squall soon afterwards came on, which occasioned an obscuration for some time. Upon the clearing up the of weather, it appeared that the Marianna Flora had crossed the point of intersection of the courses of the two vessels, and was about four miles distant on the weather bow of the Alligator. Soon afterwards she shortened sail and hove to, having at this time a vane or flag on her mast, somewhat below the head, which induced Lieutenant Stockton (the commander of the Alligator) to suppose she was in distress or wished for information. Accordingly he deemed it his duty, upon this apparent invitation, to approach her, and immediately changed his course towards her. When the Alligator was within long shot of the Portuguese ship, the latter fired a cannon-shot ahead of

the Alligator, and exhibited the appearance and equipments of an armed vessel. Lieutenant Stockton immediately hoisted the United States flag and pennant. The Marianna Flora then fired two more guns, one loaded with grape, which fell short, the other with round shot, which passed over and beyond the Alligator. This induced Lieutenant Stockton to believe her to be a piratical or a slave vessel, and he directed his own guns to be fired in return; but as they were only cannonades, they did not reach her. The Alligator continued to approach, and the Marianna Flora continued firing at her at times, until she came within musket shot, and then a broadside from the Alligator produced such intimidation, that the Portuguese ship almost immediately ceased firing. At that time, and not before, the Portuguese ship hoisted her national flag. Lieutenant Stockton ordered the ship to surrender and send her boat on board, which was accordingly done. He demanded an explanation, and the statement made to him by the Portuguese master and other officers was, that they did not know him to be an American ship of war, but took him to be a piratical cruiser. Under these circumstances Lieutenant Stockton determined to send her into the United States on account of this, which he deemed a piratical aggression. Such were the facts upon which the court was to decide. The vessel and cargo had been restored with the assent of the government and the captors, and the only remaining question was as to the liability of the captors to damages. The judgment was pronounced by Mr. Justice Story. In p. 41, the points as contended for by the claimants are thus presented: "They contend that they are entitled to damages; first, because the conduct of Lieutenant Stockton, in the approach and seizure of the Marianna Flora, was unjustifiable; and second, because, at all events, the subsequent sending her in for adjudication, was without any reasonable cause. In considering these points, it is necessary to ascertain what are the rights and duties of armed and other ships, navigating the ocean in time of peace.

"It is admitted that the right of visitation and search does

not, under such circumstances, belong to the public ships of any nation. The right is, strictly, a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true, that it has been held in the courts of this country, that American ships offending against our laws, and foreign ships in like manner, offending within our jurisdiction, may afterward be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after any right of visitation or search. The party, in such cases, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

"Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all—appropriated to the use of all—and no one can vindicate to himself a superior or exclusive prerogative there. The general maxim in such cases is, *sic utere tuo, ut non alienum lædas.*

"It has been argued that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other has a right to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach. This doctrine appears to us novel, and is not supported by any authority. It goes to establish, upon the ocean, a territorial jurisdiction, like that which is claimed by all nations within cannon shot of their own shores, in virtue of their general sovereignty. But the latter right is founded on the principles of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascer-

tain the character of strangers; and hitherto there has never been supposed, in such conduct, any breach of the customary observances or of the strictest principle of the law of nations. In respect to ships-of-war sailing as in the present case, under the authority of their government, to arrest pirates and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real character. Such a right seems indispensable for the fair and discreet exercise of their authority, and the use of it cannot justly be deemed indicative of any design to injure or insult those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear that no ship is, under such circumstances, bound to lie by or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety, but at the same time she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either as to delay or the progress or course of her voyage, but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dangers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace."

In a subsequent part of the same opinion (p. 49) we find this language: "It might be a decisive answer to this argument that, here, no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the Marianna Flora in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation."

"Upon the whole, we are of opinion that the conduct of

Lieutenant Stockton, in approaching and ultimately subduing the Marianna Flora, was entirely justifiable. The first wrong was done by her; and his own subsequent acts were a just defence and vindication of the rights and honor of his country."

These citations have been more full and distinct than under other circumstances would be deemed necessary; but these brief remarks upon a question of absorbing interest and deep concern, not only to the people of the United States and their government, but to all nations, may possibly be read by many who have not the facilities of referring to the original authorities, and because it is thought that Mr. Phillemore has not made his quotations from American authorities sufficiently full, or so arranged them as to convey to his readers an opportunity fully to appreciate their precise meaning, or to give to them their full weight.

It is the earnest desire of the great mass of the American people, sincerely so of the writer—and it is believed that this feeling is reciprocated on the other side of the Atlantic—that the present difficulties may not only be amicably adjusted, but settled in a manner which will preclude for the future any recurrence of them. We, however, believe that such controversies can alone be terminated to the mutual satisfaction of the parties, and in a way to be productive of the continuance of amicable relations, by no other mode than one, which will continue, cherish, augment, and perpetuate those feelings of mutual respect which every consideration induces the belief that they can never be diminished or shaken, by an adjustment which will leave to either party a confidence in the sincerity and untarnished honor of the other.

Deeply impressed with this feeling, we have sought, and it is hoped not unsuccessfully, to show that the American government has uniformly acknowledged every doctrine of the public law which has obtained the concurrent evidence of established usage among civilized nations, and the authority of approved jurists; that the doctrine for which we at present contend has passed this ordeal and received this

sanction; that it has been, in an especial manner, and in the most precise terms, approved by the most exalted statesmen, the ablest judges, and the most learned jurists even of England herself; that, until within a few years, the contrary doctrine against which we contend, and which we ever have and ever will resist, has met with no approbation out of England, and much of disapprobation and opposition even there; that while we are unanimous in our resolution never to concede it, the great weight of British authority is wholly antagonistic to it.

It is a subject of congratulation that there are at present, and every day increasing, indications that there will be no interruption of the harmony which has so long, and happily for both nations, subsisted between them, and these remarks will be closed with the prayer, *Esto perpetua!*